SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000795-001 DT 03/25/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STEVE BAGLIEN MARK A TUCKER

v.

MARK RUTKOWSKI (001) CARLTON C CASLER
SANDRA RUTKOWSKI (001)

CHANDLER JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

This Court has jurisdiction of this civil appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

Facts:

In the case at hand, Appellants, Mark and Sandra Rutkowski, entered a one-year residential lease agreement with landlord/Appellee, Steve Baglien. As required by the terms of the lease agreement, Appellants delivered a $1575.00 deposit to Appellee; $1225.00 was refundable, a $200 pet deposit/fee was non-refundable, and a $150 redecorating deposit/fee was also non-refundable. The lease also required Appellants to give Appellee a 30-day written notice of intent to vacate.[1] Appellants signed the lease agreement under these terms. Appellants moved into the home though it had not be prepared and cleaned for new tenants. For their troubles, Appellee gave Appellants the option of having the property professionally cleaned, or having a $75 credit towards the rent; Appellants took the $75 rent credit and cleaned the home themselves. Appellants noted in their move-in inspection that the carpets were worn and would need to be steam-cleaned. Appellants extended their lease for three consecutive one-year terms

[1] Lease Agreement – Addendum A, p. 2, #16: Notice to Vacate.

before moving out. The record shows that Appellants failed to give Appellee a 30-day written notice of intent to vacate before their lease expired[2], as required by the lease agreement. Further, Appellants failed to return the keys to Appellee. Appellee's property manager surveyed the home after Appellants moved out and noted that the home was in a state of disrepair: it reeked of cat urine; the carpets were stained beyond cleaning, the tracks of the arcadia door were rusted and full of urine, the closets were full of hair and filth, dirt was hanging from the ceiling fans, the garage door was smashed, etc.

On August 12, 2002, Appellee sent Appellants a notice that Appellee would not be refunding any of the deposits due to the destruction caused by Appellants, and that Appellee would be turning the balance of the repair costs to collection once the repairs were complete. It is noteworthy that Appellants did not request or demand the return of their deposits until after they were served with the complaint in this matter. On September 9, 2002, Appellee filed a breach of contract action in the South Mesa/Gilbert Justice Court. By Appellants' motion, the matter was transferred to the Chandler Justice Court, where the trial concluded on May 30, 2003. In a June 20, 2003 written decision, the Chandler Justice Court ruled in favor of Appellee on both the complaint and Appellants' counterclaim, awarding Appellee $453.90[3] in damages, $3,935.64 in attorney's fees, and $525.00 in court costs – a total of $4,914.543. Appellants now bring the matter before this court having filed a timely Notice of Appeal.

Issues & Analysis:

The first issue to be addressed is whether the trial court erred in awarding $695.00 as "two weeks lost rental income." The record shows that Appellants failed to give Appellee a written 30-day notice of their intent to vacate the home and failed to deliver possession of the home by not returning the keys.[4] These failures constitute a holdover by Appellants, into the month of August 2002, and therefore, Appellants became month-to-month tenants.[5] The trial judge could have order Appellants to pay the entire month's rent for August 2002.[6] Consequently, Appellants were fortunate that the trial judge only ordered them to pay $695.00.

Appellants argue that Appellee did not lose 2 weeks of rent while repairing the home. This is an issue concerning the sufficiency of evidence. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[7]

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[2] July 31, 2002.
[3] $1,678.90 in damages, minus Appellants' $1225 deposit.
[4] A.R.S. §33-1310(3): "Delivery of possession" means returning dwelling unit keys to the landlord and vacating the premises.
[5] A.R.S. §33-1314(D).
[6] A.R.S. §33-1314(C).
[7] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey,* 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission,* 94 Ariz. 113, 382 P.2d 226 (1963).

All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[8] If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the judgment and against the Appellant.[9] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[10] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[11] The Arizona Supreme Court has explained in *State v. Tison*[12] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[13]

I find no error in the lower court's ruling on this issue, as the judgment is supported by substantial, competent evidence.

The second issue is whether the trial court erred in ruling against Appellants on their counterclaim, which, pursuant to A.R.S. §33-1321(D), demanded the return of Appellants' deposits and double damages.[14] A.R.S. §33-1321(D) states:

> Upon termination of the tenancy, property or money held by the landlord as prepaid rent and security may be applied to the payment of all rent, and subject to a landlord's duty to mitigate, all charges as specified in the signed lease agreement, or as provided in this chapter, including the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with

[8] *Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[9] *Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).
[10] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).
[11] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).
[12] Supra.
[13] *Tison*, at 553, 633 P.2d at 362.
[14] Pursuant to A.R.S. §33-1321(E).

> § 33-1341. Within fourteen days, excluding Saturdays, Sundays or other legal holidays, after termination of the tenancy **and** delivery of possession **and** demand by the tenant the landlord shall provide the tenant an itemized list of all deductions together with the amount due and payable to the tenant, if any. Unless other arrangements are made in writing by the tenant, the landlord shall mail, by regular mail, to the tenant's last known place of residence. [emphasis added]

After a careful review of the record and Arizona law, I find that the trial court did err in ruling against Appellants on their counterclaim. Appellee argues that the terms of the lease agreement allow Appellee to retain the deposits if the property is damaged. This is irrelevant, for Appellants do not dispute that Appellee has this right as a landlord. Appellants only request that Appellee comply with A.R.S. §33-1321(D), which requires a landlord to provide the tenant an itemized list of all deductions (from the deposit) within fourteen days after termination of the tenancy, delivery of possession, and demand by the tenant. In Appellee's memorandum, he never addresses why he failed to send Appellants an itemized list of the deductions. He merely states that he sent Appellants a letter on August 12, 2002, informing them that their deposits would not be returned due to the destruction of the home.[15] On October 10, 2002, Appellants, through their counsel, sent a letter to Appellee, demanding the return of their deposits. Thus, on October 10, 2002, Appellee had fourteen days to provide Appellants with an itemized list of the deductions. Appellee failed to do so, thus violating A.R.S. §33-1321(D). A.R.S. §33-1321(E) states:

> If the landlord fails to comply with subsection D of this section the tenant may recover the property and money due the tenant together with damages in an amount equal to twice the amount wrongfully withheld.

Appellants argue that the security deposit was $1575.00. This is incorrect. The lease agreement plainly states that only $1225.00 was refundable as a security deposit. A $200 pet fee and a $150 redecorating fee were unequivocally listed as non-refundable. Fees listed separate from the security deposit, such as pet and redecorating deposits, are not considered part of a security deposit.[16] Hence, Appellants are entitled to a refund of the $1,225 security deposit, plus double damages of $2,450.00, for a total of $3,675.00. The trial court should have deducted this $3,675.00 from Appellee's damages[17], court costs[18], and attorney's fees[19], totaling $6,139.54.

[15] Appellee's Answering Memorandum, p. 8, ll. 7-8.
[16] *Schaefer v. Murphey*, 131 Ariz. 295, 297, 640 P.2d 857, 859 (1982).
[17] $1,678.90.
[18] $525.00.
[19] $3,935.64.

As a result, the trial court should have entered a judgment for Appellant in the amount of $2,464.54.

The third issue is whether Appellee failed to provide a written disclosure of the purposes of all non-refundable deposits, as required by A.R.S. §33-1321(B). A.R.S. §33-1321(B) states:

> The purpose of all nonrefundable fees or deposits shall be stated in writing by the landlord. Any fee or deposit not designated as nonrefundable shall be refundable.

The law does not require that such disclosures be made *after* the tenancy has ended, as this would foster fraud. The lease agreement unequivocally lists and describes each of the non-refundable fees, totaling $350.00. This is not an issue – Appellee complied with Arizona law when he disclosed the purposes of each of the non-refundable deposits. Again, as stated above, Appellants are not entitled to these non-refundable fees.

The fourth issue is whether Joelle Bice should have been excluded as a witness and/or precluded from testifying at trail. At the beginning of the trail, Appellants moved to invoked Rule 615 of the Arizona Rules of Evidence, to exclude all witnesses. Rule 615 states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of crime, as defined in Rule 39(a), Rules of Criminal Procedure, who wishes to be present during proceedings against the defendant. [emphasis added]

The court denied Appellants' motion after learning that Appellee, Steve Baglien, was an out-of-state landlord with no first-hand knowledge of the matter. Joelle Bice, the manager of the firm managing Appellee's residential property, was shown to be an essential person to the presentation of Appellee's case. If a witness' presence is essential to the presentation of a case, a court lacks the authority under Rule 615 to exclude that person from the trial.[20] Therefore, Joelle Bice should not have been excluded as a witness or precluded from testifying at trail.

The fifth issue is whether there was sufficient evidence to support Appellee's claim of damages. As discussed above, this is an issue concerning the sufficiency of evidence. An appellate court shall afford great weight to the trial court's assessment of evidence and should

[20] *State v. Williams*, 183 Ariz. 368, 380, 904 P.2d 437, 449 (1995).

not reverse the trial court's weighing of evidence absent clear error.[21] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[22] If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the judgment and against the Appellant.[23] I find no conflicts in the record concerning Appellee's damages, or in the trial court's findings of such. Appellee met his burden of proof concerning damages.

The sixth issue is whether the trail court had jurisdiction to award attorney's fees, given Appellants' premature filing of their notice of appeal. It is clear from the record that Appellants mistook the trial court's June 20, 2002 untitled decision as a "final judgment, " causing them to prematurely file a notice of appeal. Appellants erroneously base the lack of jurisdiction claim on the decision in *Allstate Ins. Co. v. Universal Underwriters, Inc.*[24], which held that once a notice of appeal is filed, the trial court no longer has jurisdiction to render subsequent decisions. Unlike the case at bar, in *Allstate Ins. Co.*, the appellant filed a notice of appeal after the final judgment, but before the filing of the attorney's fee application. In the case at bar, Appellants filed their notice of appeal before the final judgment was entered and before Appellee filed his application for attorney's fees. Appellee correctly argues that a premature appeal becomes effective after the final judgment is signed and entered by the clerk of the court,[25] and while the premature appeal is not jurisdictionally defective, it is not encouraged or approved.[26] Also, a premature notice of appeal is still valid where, as in the case at bar, it is followed by an entry of an appealable judgment.[27]

The final issue is whether the trail court erred by prematurely ruling on the issue of attorney's fees without affording Appellants an opportunity to object thereto. It is due to Appellants' premature filing of their notice of appeal that made their time to object seem rushed. Nonetheless, Appellants failed to object to the award of attorney's fees in the time allowed by Rule 58(d)(1) of the Arizona Rules of Civil Procedure, and will not, therefore, be considered for the first time on appeal.[28]

IT IS THEREFORE ORDERED affirming, in part, the decision of the Chandler Justice Court.

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[21] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).
[22] *Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[23] *Guerra*, supra; *State v. Girdler,* 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).
[24] 199 Ariz. 261, 17 P.3d 106 (App. 2000).
[25] *Guinn v. Schweitzer*, 190 Ariz. 116, 945 P.2d 837(App. 1997).
[26] *McLaws v. Kruger*, 130 Ariz. 317, 636 P.2d 95 (1981).
[27] *Schwab v. Ames Const.*, --- Ariz. ----, 83 P.3d 56, 418 Ariz. Adv. Rep. 45, (App. 2004).
[28] *Murphy v. Town of Chino Valley*, 163 Ariz. 571, 789 P.2d 1072 (App. 1989).

IT IS THEREFORE ORDERED that the portion of the trial court's judgment regarding Appellants' counterclaim is reversed and remanded for entry of a judgment in favor of Appellants consistent with this opinion.

IT IS FURTHER ORDERED denying both parties' requests for attorneys fees and costs incurred in this appeal.

IT IS FURTHER ORDERED remanding this matter back to the Chandler Justice Court for all further and future proceedings.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT